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CHARLES ELM

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. ~~494~~ 3

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

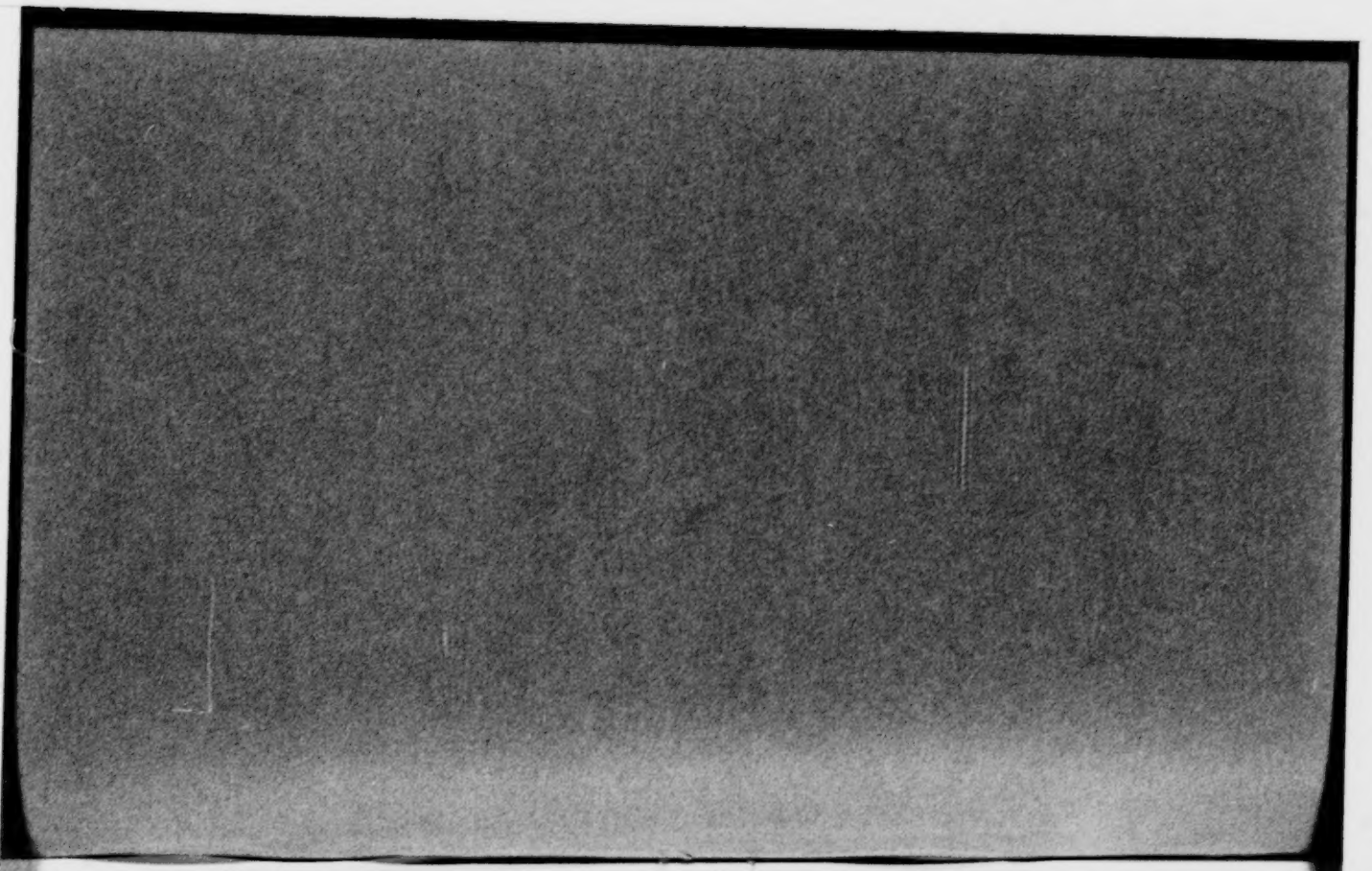
—against—

VIVIAN F. BALDWIN and E. R. BALDWIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO.

WILLIAM MARSHALL BULLITT,
ALLAN C. ROWE,
Counsel for Petitioner.

THE COURT PRESS, INC., N. Y. C.



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No. .

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

—against—

VIVIAN F. BALDWIN and E. R. BALDWIN,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Idaho.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The American Surety Company of New York petitions for a writ of *certiorari* to review the Supreme Court of Idaho's judgment in *Baldwin* v. *Anderson,* 299 Pac. 341.

Summary Statement of the Matters Involved.

The Baldwins recovered a $19,500 judgment against one Anderson and Singer Sewing Machine Company for an automobile collision; and both defendants appealed (R. 1, 3). The Singer Company superseded the judgment against it, with the American Surety Co. as surety on the supersedeas bond (R. 6). Anderson *did not supersede.*

On appeal the judgment was affirmed as to Anderson; but was reversed as to the Singer Company and the suit was dismissed as to it (R. 14, 15). (*Baldwin* v. *Anderson,* 49 Idaho 231.)

The lower state court, apparently inadvertently *and without notice to or process upon* the American Surety Co., entered up a $19,500 judgment against it on the supersedeas bond, as if it had been surety on a bond for Anderson (R. 18). As soon as the Surety Co. learned of such judgment, it moved to set it aside as void (R. 21); and the judgment was duly vacated (R. 33).

The Baldwins again appealed to the Supreme Court of Idaho; which held that the lower court, having once entered up a judgment against the Surety Co., had no power to vacate it (R. 46). The Idaho Supreme Court has thus reinstated the lower court's judgment against the Surety Co., with the result that the Surety Co. is now held liable for the $19,500 judgment against Anderson *which it never bonded;* and a judgment for $22,357.21 has been rendered against it, *without notice or process or an opportunity to defend.*

The Supreme Court of Idaho based its decision upon the theory that when the Surety Co. became surety on a supersedeas bond for one *successful* appellant, it automatically became such a party to the suit as to be bound by any kind of future judgment rightly or wrongly entered against it and rendered without notice or service of process, even on the question of its liability for the *defeated* appellant, for whom it had never become surety (R. 50, 51).

The Idaho Supreme Court declined to even consider the question of whether the Surety Co. did in fact become surety for Anderson on the supersedeas (R. 50).

The Court suggested that the Surety Co.'s sole remedy to test the question of whether it was in fact liable as supersedeas for Anderson was by appeal from the *ex parte* judgment. As the time to appeal had already expired when this suggestion was made, it did not afford any opportunity for a hearing on the merits.*

One of the justices dissented vigorously, declaring:

> "The bond upon its face, in unmistakable language, shows that it was given to stay execution against the Singer Sewing Machine Company and for no one else, and the court therefore had no authority to construe the bond to include the judgment against Anderson. The judgment against the surety company on the supersedeas bond was therefore void when entered, and was subject to attack by motion to, and was properly set aside.
>
> *No other result can follow from the holding of the majority than a miscarriage of justice, and it is repugnant to both the state and federal constitutions in that the surety company is deprived of its property without due process of law"* (R. 63).

The Ground for the Allowance of the Writ.

The Surety Co. has been deprived of its property without due process of law in violation of the 14th Amendment by a state court decision that is in conflict with the settled decisions of the Supreme Court of the United States.

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* Judgment against petitioner on the supersedeas bond was entered June 23, 1930 (R. 18). The time to appeal therefrom expired ninety days thereafter (§7152 Idaho Compiled Statutes). The decision of the Idaho Supreme Court that petitioner's sole remedy was by appeal was not rendered until May 2, 1931 (R. 46).

FIRST POINT.

The judgment is void for lack of jurisdiction over the Surety Co.'s person.

The *mere execution* of a supersedeas bond which might involve the justiciable question of whether it covers Anderson as well as the Singer Co. did not make the Surety Co. such a party to the suit as to give the Idaho courts jurisdiction of the Surety Co.'s person to render an *ex parte* judgment determining this question.

In *National Exchange Bank* v. *Wiley*, 195 U. S. 257, the question involved was the validity of a judgment entered in another State (Ohio). The judgment was entered without process upon a confession executed in connection with a note. The Ohio judgment was attacked as void on the ground that the judgment exceeded the consent, *i. e.*, that the confession did not authorize the judgment because plaintiff was not the holder of the note. It was claimed that this defect was cured by an Ohio statute. This court held otherwise, declaring, Mr. JUSTICE HARLAN, p. 268:—

> "In other words, the defendant Wiley could show collaterally that he was not legally before the court—as he was not, in any just sense—if his appearance was entered and judgment confessed by one who had in fact, at the time, no authority to do either; and, consequently, that the court was without jurisdiction to proceed except on legal notice to him, or without his appearance in person or by an attorney authorized to represent him. *If law and usage in Ohio were to the contrary, then such law and usage*

would be in conflict with the Constitution of the United States; for it is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law."

and also at page 270:—

"It was, in such case, in legal effect, a personal judgment without service of process upon the defendants, and without their appearance in person or by an authorized attorney. The proceedings were wanting in due process of law. The obligors never consented to judgment by confession in favor of one who was not the owner of the note or entitled to receive its proceeds, and the warrant of attorney cannot be held to have authorized such a confession."

In *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25, Mr. JUSTICE HOLMES said at page 29:—

"A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by its mere assertion of its own power (*Thompson* v. *Whitman*, 18 Wall 457) even where its power depends upon a fact and it finds the fact (*Tilt* v. *Kelsey*, 207 U. S. 43)."

The case at bar presents an exact parallel. Here, as in the *Wiley* case, the question in dispute is whether the instrument authorized an *ex parte* judgment under the conditions existing. In the *Wiley* case, this court

held that such a question could not be decided in Wiley's absence and that he could attack any judgment based thereon as void. In the instant case the Supreme Court of Idaho has held that the disputed question can be decided in the Surety Co.'s absence and that Surety Co. cannot attack it as void but must appeal.

A court cannot acquire jurisdiction over the person by deciding ex parte that it has such jurisdiction, where a substantial question exists upon which the jurisdiction depends.

SECOND POINT.

The Federal question was raised in due season.

Upon the rendition of the decision by the Idaho Supreme Court, petitioner promptly moved for rehearing and raised the constitutional question (R. 69).

In *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313, this court has held that such practice was timely. A petition for *certiorari* to the United States Supreme Court was allowed. Mr. JUSTICE BUTLER said (p. 320):—

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. *Citizens Nat. Bank* v. *Durr,* 257 U. S. 99, 106. But here the company, at the first opportunity, invoked the protection of the Federal Constitution and statute. It could not earlier

have assailed the section as violative of the Constitution and laws of the United States.

The board of equalization completely eliminated the bonds from its calculations, and there is nothing in the language of the section to suggest that it authorizes any diminution of the amount of the deductible reserve and unpaid claims or an apportionment of such liabilities between taxable and non-taxable assets. It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke Federal protection against the taxation of its United States bonds. Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the State the Federal questions here presented and is entitled to have them considered. *Saunders* v. *Shaw*, 244 U. S. 317, 320; *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.*, 281 U. S. 74 *ante*, 710."

Petitioner was not bound to anticipate in advance of the decision of the Supreme Court of Idaho, that it would declare the hitherto unheard of doctrine that the mere execution of a supersedeas bond for the Singer Co. (even if it presented the question whether the Surety Co. became surety for Anderson) amounted to a consent that such question be determined *ex parte* and prevented the Surety Co. from attacking the *ex parte* judgment as void for lack of jurisdiction.

WHEREFORE the American Surety Co. respectfully prays that a writ of *certiorari* issue out of this Court directed to the Supreme Court of Idaho to review its decision.

WILLIAM MARSHALL BULLITT,
ALLAN C. ROWE,
Counsel for Petitioner.